Supreme Court, U.S.
FILED

05-729 OCT 21 2005

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT of the UNITED STATES

BEN F. BARCUS,
Petitioner,

v.

MARK SCHNEIDER,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Ninth Circuit erred in concluding, contrary to principals of equity and the Court's inherent power to police misconduct within its proceedings, that 11 U.S.C. § 1330(a) divests the Bankruptcy Courts of policing powers to sanction an attorney/debtor who made false statements under oath and committed fraud because over six months had lapsed preceding the hearing for sanctions (which delay was caused by a attorney/debtor who undertook efforts to frustrate Petitioner's effort to expose such misconduct)?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The Petitioner here and Appellant below is Ben F. Barcus. The Appellee below and Respondent here is Mark A. Schneider.

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OPINIONS BELOW

The opinion in the Court of Appeals was not published. The Court of Appeals memorandum was issued of record in the proceedings on June 14, 2005 and is attached as Pet. App. A-20. It denied Petitioner's Motion for Reconsideration en banc on July 27, 2005. Pet. App. A-30. Its Judgment was issued on June 14, 2005.

JURISDICTION

The Court of Appeals entered its judgment on August 8, 2005. On July 27, 2005, the Court of Appeals entered its Order denying Petitioner's Motion for en banc Reconsideration of its mandate. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of Title 11 of the United States Code commonly referenced as the United States Bankruptcy Code.

The pertinent provisions are as follows:

> **11 U.S.C. Section 349(a):**
> Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

> **11 U.S.C. Section 523(a):**
> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by---

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . .

11 U.S.C. Section 1307(c):
On request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including---

(1) unreasonable delay by the debtor that is prejudicial to creditors . . .

(6) material default by the debtor with respect to a term of a confirmed plan . . .

(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;

11 U.S.C. Section 1330(a):
On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005-11 U.S.C. Section 1328:

(a). . .the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except and debt—

(2) of the kind specified in section 507(a)(8)(c) or in paragraph (1)(B), (1)(C), (2), (3), (4),(5), (8) or (9) of section 523(a).

STATEMENT OF THE CASE

This is a case involving the lower court's jurisdiction and ability to police egregious misconduct that occurs within a court proceeding. Resolution of the question presented here will alleviate Congressional undermining of the Court's inherent policing powers and ability to do equity. Resolution of the question presented will deter misconduct of a party to a bankruptcy proceeding.

The Respondent, who is also an attorney and officer of the Court, facilitated a scheme of deceit that has been described by the District Court as being egregious and contrary to Washington Rule of Professional Conduct 8.4, which prohibits conduct involving dishonesty, fraud, deceit, misrepresentation or conduct prejudicial to the administration of justice. The District Court noted Respondent's conduct "raises serious questions about [Respondent's] fitness for the practice law within this jurisdiction." Regardless, the lower courts have read 11 U.S.C. § 1330(a) as limiting a court's power to police such misconduct (or to otherwise fashion a remedy equitable to all parties concerned) solely to events brought to the court's attention within 180 days of bankruptcy confirmation.

Review is urgently needed to rectify an apparent encroachment upon the separation of powers doctrine and to resolve a conflict with a Congressional limitation of the Bankruptcy Court's authority over bankrupt debtors.

Moreover, review is urgently needed to determine the standards of the court's ability to police misconduct on a case-by-case basis, rather than be restricted without discretion. Moreover, there have been substantial changes to the United States Bankruptcy Code subsequent to the parties having filed their respective Appellate briefs. The theories and the case law cited below by Respondent are in direct conflict with the present articulated Congressional mandate contained within the revised Bankruptcy Code.

The 2005 Congressional redraft of the Bankruptcy Code indicates a clear public policy mandate favoring the theories advanced by the Petitioner. For example, debts from fraud will no longer be dischargeable in Chapter 13. See, 11 U.S.C. § 1328 (2005), which substantially modified the former super-discharge under Chapter 13 to not allow for debts procured by fraud to be discharged. The modified Code specifically exempts debts procured by fraud, and debts procured by embezzlement or defalcation from discharge in Chapter 13. See, 11 U.S.C. § 1328(a)(2) (2005). Petitioner converted from Chapter 7 to Chapter 13 at the last moment, on the eve of trial, to determine that the debt owed Petitioner was not dischargeable under 11 U.S.C. § 523(a)(2) (fraud) and 11 U.S.C § 523(a)(4) (embezzlement and defalcation).

Certiorari is also necessary in order to develop a comparison to and development of the public policy trends to the issues presented to the Court below on appeal, *vis-à-vis*, the exceptional facts of this case. There is an old adage: where there is an injustice, the law should allow a remedy. The Respondent's willful contempt of the Bankruptcy Court rules and orders, and Respondent's misconduct during the pending Bankruptcy proceedings call for distinguishing the facts of this case from *In re Valenti*, 310 B.R. 138, 145 (BAP 9th Cir. 2004) and the time limitations of 11 U.S.C. § 1330(a).

Respondent's fraud and abuse of the judicial process has been ignored by the Court below by adoption of a bright line (absolutely no exception) rule limiting creditors in bankruptcy to the time in which fraud could be discovered and relief from the effects of such fraud could be obtained.

Certiorari is also necessary in order to develop a comparison to the public policy trends to the issues presented to this Court on appeal, *vis-à-vis*, the exceptional facts of this case.

A. Factual Background

Petitioner, Ben F. Barcus, is a creditor in Respondent's bankruptcy who objected to confirmation of the Respondent's Chapter 13 plan. The Chapter 13 filing came only after the Respondent's conversion from Chapter 7 and a then pending bankruptcy adversary proceeding determining debts owed Petitioner were not dischargeable based upon fraud and embezzlement. Pet. App. A-36.

Respondent was employed by Petitioner for a period of time from January 1992 up to February 23, 1998, when his misconduct was discovered. Petitioner is a lawyer; Respondent was an associate attorney employed by Petitioner. Pet. App. A-36.

Petitioner filed a Chapter 13 proof of claim. The Petitioner's claim was based upon, in the broadest sense, that the Respondent, his former employee, committed several acts of theft, as well as ancillary claims. Pet. App. A-36. Petitioner's claim has essentially three (3) separate components. First, Respondent carried out an elaborate "on the side business" during his employment with Petitioner wherein he diverted client cases to himself and personally accepted attorneys' fees paid by clients through his "on the side business" during his tenure as an employee with Petitioner.

Second, Respondent fraudulently induced a number of Petitioner's clients to remove their files from Petitioner's offices after Respondent's termination of employment, as well as converted attorneys' fees due and owing Petitioner during Respondent's course of employment, but collected by Respondent after his termination. Third, Respondent incurred unauthorized and fraudulent charges on Petitioner's business credit card account, including among other things, the purchase of a computer, clothing and meals for Respondent's "on the side" employees. Pet. App. A-36.